Special Issue – Preliminary References to the CJEU
Part Three

Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure

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A. Constitutional Courts as Judges Under Article 267 TFEU

The main purpose of the preliminary ruling procedure is to prevent divergences in judicial decisions applying European Union (EU) law and to ensure the uniform interpretation of EU legal provisions across Member States. The procedure, introduced in the Founding Treaties,[1] has provided a platform for the Court of Justice of the European Union (hereafter, the ECJ or the CJEU) to deliver seminal judgments that have progressively defined the relationship between national and EU legal systems, among others. The procedure has also helped the ECJ to develop fundamental principles of EU law, including direct effect, indirect effect (i.e., the interpretation of national law in line with directives) and primacy.[2] Being one of the most important aspects of the EU judicial system, the procedure provided by Article 267 of the Treaty on the Functioning of the European Union (hereafter, TFEU) has had an immense impact on the harmonious development of EU law and the way in which national courts and EU courts interact and communicate.

The idea of ensuring the uniform application of EU law certainly influenced the ECJ in its adoption of a broad meaning of the term "court" under Article 267 TFEU. According to the settled jurisprudence of the CJEU, when determining whether the authority referring a preliminary question is a court within the meaning of Article 267 TFEU, the CJEU takes into account all the circumstances of the case, including in particular the legal basis for the existence of the judicial body, its permanent or temporary character, the mandatory nature of its jurisdiction, the adversarial type of proceedings, the application of the rules of law, and the principle of judicial independence.

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[1] Treaty instituting the European Coal and Steel Community, 23 July 1952, Art. 41, UNTS, vol. 261, 171 (ratified through 1952). Treaty establishing the European Economic Community, 1 January 1958, Art. 177, UNTS, vol. 294, 295, 296, 297, 298 (ratified through 1957).

[2] ANDREAS NORBERG, PRELIMINARY RULINGS AND THE CO-OPERATION BETWEEN NATIONAL AND EUROPEAN COURTS 16 (2006).

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As regards the status of constitutional courts under Article 267 TFEU, the jurisprudence of the CJEU still lacks a clear statement that constitutional courts are, in principle, bound by the obligation to refer. The CJEU rather presumes that the jurisdiction and function of a body determine whether it can be considered as a court (and court of last resort) under Article 267 TFEU.[3] At the same time, the issue was twice considered in the ECJ Annual Reports, and it was also analyzed in several opinions of the Advocates General (hereafter, AG).

In the 1998 ECJ Annual Report, the view was expressed that there are good reasons to consider the admissibility of preliminary questions referred by constitutional courts.[4] This position was upheld in the 2002 ECJ Annual Report.[5] This time, however, the ECJ went even further and *explicitly* stated that constitutional courts are covered by the obligation imposed on national courts under the current Article 267(3) TFEU.[6]

As far as the Opinions of AGs are concerned, it is worth mentioning two of them, both delivered by AG Kokott. In her Opinion delivered on 2 July 2009 in *Presidente del Consiglio dei Ministri v. Regione Autonoma della Sardegna*, AG Kokott held that the reference by the Italian *Corte Costituzionale* was a good illustration of the fact that, also in proceedings before national constitutional courts, questions of EU law may arise that are decisive for the outcome of the constitutional dispute in question.[7] AG Kokott pointed out that EU law may be relevant to the decision in constitutional disputes where, among others factors, the purported effects of an EU law measure are at issue in constitutional law proceedings or where the scope left by an EU law measure for the national legislature is open to review by a constitutional court.[8] In another case, AG Kokott also considered the admissibility of the preliminary reference made by the Lithuanian Constitutional Court, and stated that constitutional courts also fall within the definition of 'court' for the purposes of the then Article 234 EC.[9] It is worth highlighting that the AG *implicitly* denied

[3] *See also* the guidance provided by the ECJ on the preliminary reference procedure by national courts, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106(01)&from=EN.

[4] *See* the text of the annual report, *available at* http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels. Proceedings of the Court of Justice in 1998 by Mr G.C. Rodríguez Iglesias, President 2–3.

[5] *See* the text of the annual report 8–9, *available at* http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels.

[6] Treaty on the Functioning of the European Union, 26 October 2012, Ex. Art. 177 and 234, OJEC, vol. 326, 141 and 164 [hereinafter TFEU].

[7] Opinion of Advocate General Kokott at para. 22, Case C–169/08, Presidente del Consiglio dei Ministri v. Regione Sardegna, 2009 E.C.R. I–10821.

[8] Opinion of Advocate General Kokott at para. 23, Case C–169/08, Presidente del Consiglio dei Ministri v. Regione Sardegna, 2009 E.C.R. I–10821.

[9] Opinion of Advocate General Kokott at para. 16, Case C–239/07, Sabatauskas and Ohters, 2008 E.C.R. I–07523.

the admissibility of a preliminary reference made during *a priori* review of a statute, by stating that the reference made by the Lithuanian Constitutional Court fulfilled all procedural requirements since it was made during the review of a statute which had already come into force.[10]

The CJEU criteria for a court (and court of last resort) under the current Article 267(3) TFEU and the Opinions of AGs in cases filed by constitutional courts prove that the CJEU supports such preliminary references. Nevertheless, only a few constitutional courts have referred to the CJEU so far.[11] The Polish Constitutional Tribunal (*Trybunał Konstytucyjny*; hereafter, the PCT) belongs to the majority of constitutional courts that have still not applied the preliminary reference procedure. May the PCT be considered as a court of last resort under Article 267(3) TFEU? The answer to this question depends on the PCT's jurisdiction and function. Therefore, before analyzing the present case law of the PCT concerning the preliminary procedure, the rudiments of the PCT's position in the Polish constitutional system need to be presented.

B. The PCT's Position in the Context of the Preliminary Ruling Procedure

The PCT's position in the political system is characterized by the principle of independence. According to Article 10(2) of the Constitution of 2 April 1997 (hereafter, the Polish Constitution or the Constitution), which states that judicial power shall be vested in courts and tribunals, the PCT is to be regarded as an organ of judicial authority. However, the distinction between courts and tribunals must be emphasized. Courts—and courts only—constitute the system of organs established to adjudicate in individual cases ("to implement the administration of justice," according to the phrasing of Article 175(1) of the Constitution) and are subordinated—in a certain way—to the Supreme Court and the Supreme Administrative Court. The PCT (together with the Tribunal of State) remains outside the system of courts, thus constituting a separate branch of judicial power.[12]

The Polish Constitution recognizes four areas of the PCT's jurisdiction:

(1) The review of norms (both abstract and specific; *a posteriori* and a priori); a particular procedure for reviewing norms is adjudicating on constitutional complaints;
(2) Settling disputes over authority between the central constitutional organs of the State;

[10] *Id.* at para. 18.

[11] *See* Aleksandra Kustra, *Sądy konstytucyjne a procedura prejudycjalna przed Trybunałem Sprawiedliwości Unii Europejskiej*, 4 PRZEGLĄD SEJMOWY 78 (2012).

[12] *See* ZDZISŁAW CZESZEJKO-SOCHACKI, LESZEK GARLICKI, JANUSZ TRZCIŃSKI, *KOMENTARZ DO USTAWY O TRYBUNALE KONSTYTUCYJNYM* 6 (1999).

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(3) Deciding on the conformity with the Constitution of the purposes or activities of political parties;
(4) Determining whether or not there exists an impediment to the exercise of office by the President of the Republic.[13]

Without any doubt, the primary function of the PCT is the control of hierarchical conformity of legal norms, and the eliminating of norms which are inconsistent with the system of law in force. The exclusive point of reference for such adjudication is the Constitution.[14]

The Polish constitutional system provides for both *a priori* review (review of preventive nature) and *a posteriori* review (which refers to such normative acts that are already enacted, are in force, or are still in the *vacatio legis* period). However, it clearly assigns priority to *a posteriori* review. Only exceptionally may the review of norms be conducted *a priori,* and the only subject entitled to initiate such a review is the President of the Republic. By contrast, the right to initiate the proceedings under the abstract review procedure is vested in a fairly wide range of subjects.

We can also distinguish between a universal and a particular initiative. The universal (general) initiative permits the questioning of the constitutionality of every normative act, regardless of whether the content of this act is related to the scope of activity of the applicant. This right belongs to numerous State organs (the President, the Marshals of the Sejm and the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor General, the President of the Supreme Chamber of Control, and the Commissioner for Citizens' Rights) and the parliamentary opposition (a group of 50 Deputies or 30 Senators).

The particular initiative permits the questioning of those acts or norms that relate to matters within the scope of activity of the applicant. The right to a particular initiative belongs to: the National Council of the Judiciary to the extent to which the questioned acts relate to the independence of courts and judges; the constitutive organs of units of local government; the national organs of trade unions, as well as the national authorities of employers' organizations and occupational organizations; and churches and religious organizations.

The concrete review may be initiated in two ways. The first is the consequence of the right of all courts to refer a question of law to the PCT. In order to submit a question, a

[13] *See* KRZYSZTOF WOJTYCZEK, SĄDOWNICTWO KONSTYTUCYJNE W POLSCE. WYBRANE ZAGADNIENIA (2013).

[14] *See* PIOTRA TULEJA, STOSOWANIE KONSTYTUCJI RP W ŚWIETLE ZASADY JEJ NADRZĘDNOŚCI (WYBRANE PROBLEMY) (2003).

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court must be doubtful as to the conformity with the Constitution of a legal norm on which its decision is to be based. The court referring such a question to the Tribunal shall suspend the proceedings in the case to which the question relates, so that the decision can be based on the judgment of the PCT.

Constitutional complaint in Poland is another form of initiating a concrete review before the PCT, since an allegation can only be based on the unconstitutionality of a normative act upon the basis of which a final decision infringing the constitutional freedoms or rights of a complainant was passed.

The catalogue of norms under review, at least for the abstract review proceedings, is listed in Article 188 of the Constitution. This submits three types of acts to the PCT's review: statutes, international agreements, and legal provisions issued by central State organs.

As to the effects of PCT judgments, it should be highlighted that they may not be appealed against and have an *erga omnes* effect (i.e., they are binding on all addressees). Under the Polish system of constitutional review, as a rule, the loss of the binding force of the reviewed unconstitutional act takes effect on the day of the publication of the PCT's judgment. However, the PCT may specify another date for the end of the binding force of a normative act (the *pro futuro* effect of the judgment). Such a period may not exceed 18 months in relation to a statute, or 12 months in relation to any other normative act (Article 190(3) of the Constitution).[15]

C. The PCT Case Law Concerning the Preliminary Ruling Procedure and the Obligation to Refer Under Article 267(3) TFEU

I. Accession Treaty Judgment – General Acceptance of the Duty to Refer Under Article 267(3) TFEU

All the rudimentary information regarding the PCT's position in the political system of Poland suggests that the PCT should consider itself as a court of last resort under Article 267(3) TFEU.

The PCT was aware of this fact, and just a few days after Poland's accession to the EU, it decided on its status under Article 267 TFEU. In a judgment of 11 May 2005, K 18/04 concerning the constitutionality of the Accession Treaty (hereafter, the *Accession Treaty*

[15] *See* MONIKA FLORCZAK-WĄTOR, ORZECZENIA TRYBUNAŁU KONSTYTUCYJNEGO I ICH SKUTKI PRAWNE (2006); Katarzyna Gonera, Ewa Łętowska, *Artykuł 190 Konstytucji i jego konsekwencje w praktyce sądowej* 9 PAŃSTWO I PRAWO (2003).

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judgment), the PCT accepted the obligation to make a preliminary reference to the ECJ, at least when performing a constitutional review of legislation.

As the *Accession Treaty* judgment still remains the most comprehensive one delivered on the status of EU law in the Polish legal system, it is worth briefly presenting several salient statements from the *Treaty* which have had an impact on the PCT's considerations concerning the preliminary ruling procedure.[16]

In the *Accession Treaty* judgment, the PCT decided that Poland's accession to the EU did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Polish State. The process of European integration, connected with the delegation of competences to EU organs in relation to certain matters, has its basis in the Constitution (Article 90[17]), as the mechanism for Poland's accession to the EU finds its express grounds in constitutional regulation and the validity and efficacy of the integration are dependent upon the fulfilment of constitutional elements of the integration procedure, including the delegation of the competences. The PCT highlighted that none of the constitutional provisions authorize the delegation to the EU of the competence to issue legal acts or to take decisions contrary to the Polish constitution, which is the supreme law of the Republic of Poland (Article 8(1) of the Polish Constitution). Concomitantly, the Constitution does not authorize the delegation of powers to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State.

Regarding the status of the Accession Treaty, the PCT held that the precedence over statutes of the application of international agreements which were ratified on the basis of

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[16] *See* Jan Barcz, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 169 (2005); Stanisław Biernat, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 185 (2005); Władysław Czapliński, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 207 (2005); Anna Wyrozumska, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 4 KWARTALNIK PRAWA PUBLICZNEGO 223 (2005); Krzysztof Wójtowicz, *Glosa wyroku TK z dnia 11 maja 2005 r., K 18/04*, 6 PRZEGLĄD SEJMOWY 190 (2005).

[17] "(1) The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

(2) A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

(3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

(4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies."

statutory authorization or consent granted via the procedure of a nationwide referendum (procedures provided for in Article 90 and Article 91 of the Constitution[18]), in no way signifies an analogous precedence of these agreements over the Constitution.

Furthermore, the PCT claimed that the concept and model of EU law created a new situation wherein, within each Member State, autonomous legal orders coexist and are simultaneously operative. Their interaction may not be described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law.

Considering the role of the ECJ in the EU legal order, the PCT pointed out that the ECJ is the primary, but not sole, depositary of powers as regards the application of the Treaties within the EU legal system. The PCT highlighted that the interpretation of EU law performed by the ECJ should fall within the scope of functions and competences delegated to the EU by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of mutual loyalty between the EU institutions and the Member States. According to the PCT, this assumption generates a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty on the Member States to respect EU norms.

In the context of the main topic of this paper, it is worth mentioning that one of the constitutional issues discussed in the *Accession Treaty* judgment was the compliance of the preliminary ruling procedure itself (in general) with the Polish constitution. The initiators of the proceedings before the PCT (a group of Deputies from the Sejm) more than any other group claimed that the obligation to refer to the ECJ limits the judicial independence in an unconstitutional way (Article 178(1) of the Constitution) and threatens the supremacy of the Polish Constitution (Article 8(1) of the Constitution).

The PCT decided that the principle of judicial independence (understood in such a way that judges are subject to the Constitution) also encompasses the duty to apply EU law (then Community law) binding upon Poland. According to the PCT, such a duty arises as a result of the ratification, in compliance with the Constitution and on the basis thereof, of the Founding Treaties of the EU. The PCT pointed out that the ECJ's competence to

[18] Article 91: "(1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

(2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

(3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

declare a binding interpretation of EU law *via* the preliminary ruling procedure constitutes an element of the aforementioned Treaties and as such does not conflict with the constitutional principle of judicial independence nor does it threaten the supremacy of the Polish Constitution.

The PCT also stated further that the preliminary reference neither constitutes a threat to the PCT's competences determined in Article 188 (scope of jurisdiction in constitutional review proceedings) nor narrows them. Considering its status as a court under Article 267(3) TFEU (then Article 234 EC), the PCT claimed that if it decides to request a preliminary ruling concerning the validity or the content of EU Law, it would undertake this within the framework of exercising its adjudicative competences and only where, in accordance with the Constitution, it ought to apply Community law.[19]

Such a statement suggests that the PCT considered itself to be obliged to refer to the ECJ in all kinds of constitutional review proceedings, whether they were *a priori* or *a posteriori* and either abstract or concrete review. It should also be noted that the PCT did not narrow the scope of hypothetical preliminary questions, which may concern both the interpretation as well as the validity of EU law. However, some reservations are to be raised regarding an *ultra vires* review of EU law. Similarly to the standpoint of the German Federal Constitutional Court (*Bundesverfassungsgericht;* hereafter, the FCC) taken in numerous judicial decisions (from the *Maastricht* judgment onwards),[20] the PCT stated in the *Accession Treaty* judgment that because of the limited and conditional character of the conferral of EU competences, the PCT is authorized to perform an *ultra vires* review of EU acts. Nevertheless, unlike its German counterpart, the PCT seems to exclude the ECJ's judgments from the scope of this review. The PCT pointed out that the interpretation of EU law performed by the ECJ should fall within the scope of functions and competences delegated to the EU by its Member States, should be consistent with the principle of subsidiarity, and should be based upon the assumption of loyal cooperation (Article 4(3) TEU) between EU institutions and Member States. In the *Accession Treaty* judgment, the PCT highlighted that these reservations generate a duty for the ECJ to be sympathetically disposed towards national legal systems and a duty for the Member States to show the highest standard of respect for EU norms. Nevertheless, at the same time the PCT claimed that the direct review of the conformity of particular decisions of the ECJ with the Constitution does not fall within the PCT's scope of jurisdiction (Article 188 of the Constitution).[21]

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[19] Point 11.1. of the judgment.

[20] *See* Mehrdad Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48.1 COMMON MKT. L. REV. 9–38 (2011).

[21] Pursuant to Art. 188 of the Polish Constitution: "The Constitutional Tribunal shall adjudicate regarding the following matters:

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II. Act on Excise Duty *Decision—The PCT's Isolationist Strategy and its Possible Consequences as Regards Preliminary Reference in Cases Initiated in Concrete Review Proceedings*

Another reservation concerning the PCT's hypothetical reference to the ECJ can be raised on account of the decision of 19 December 2006, case P 37/05 (hereafter, the *Act on excise duty* decision). The proceedings, which were initiated by the question of law referred by the Regional Administrative Court in Olsztyn, concerned the compliance of a statutory provision (the Act on excise duty[22]) with Article 90 EC (and Article 91 of the Polish Constitution, which in paragraph 2 guarantees international agreements ratified upon prior consent granted by statute a precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes). The PCT declined jurisdiction to answer this question of law and ruled that the issue at stake concerned the interpretation of EU law, and as such fell within the ECJ's jurisdiction.[23] The PCT highlighted the autonomy of the EU judicial system and the principles of judicial cooperation with national courts and held that the preliminary ruling procedure constitutes a fundamental mechanism of such judicial cooperation. The PCT decided that there was no need to refer questions of law regarding the conformity of domestic law with EU law to the PCT. The issue of solving conflicts in relation to domestic statutes falls outside the scope of the jurisdiction of the PCT, since the decisions on whether a statute remains in conflict with EU law shall be delivered by Polish courts (the Supreme Court, administrative courts, and common courts), while the interpretation of EU law shall be delivered by the ECJ by way of preliminary rulings.[24]

What is significant for the issue of the PCT's hypothetical use of the preliminary ruling procedure is the fact that the case was initiated by a court in concrete review proceedings. Therefore, the question may be raised as to whether, in the *Act on excise duty* decision, the PCT did not narrow the acceptance of its status as a court under the

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1) the conformity of statutes and international agreements to the Constitution;2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;4) the conformity to the Constitution of the purposes or activities of political parties; 5) complaints concerning constitutional infringements, as specified in Article 79, para. 1."

[22] The Act of 23 January 2004 on excise duty (Journal of Laws (Dz.U.) No. 29, item 257, as amended).

[23] *See also* Adam Lazowski, *Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Court and the Court of Justice,* 4 EUR. CONST. L. REV. 187–97 (2008).

[24] *See* Bolesław Banaszkiewicz, *Glosa do postanowienia Trybunału Konstytucyjnego z 19 grudnia 2006 r., P 37/05 (problem kontroli zgodności polskiej ustawy z prawem wspólnotowym)*, 2 PRZEGLĄD LEGISLACYJNY 108 (2007); Anna Wyrozumska, *Stosowanie prawa wspólnotowego a art. 91, 188 i 193 Konstytucji RP*, 3 EUROPEJSKI PRZEGLĄD SĄDOWY 39 (2007).

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current Article 267(3) TFEU to being a court only able to engage in abstract review proceedings, similarly to the standpoint made by the Italian Constitutional Court (*Corte Costituzionale;* hereafter, the ICC) in the first reference to the ECJ (order No. 103/2008 of 13 February 2008).[25] However, in 2013 the ICC significantly changed its position and also referred to the ECJ in abstract review proceedings (Order No. 207/2013 of 23 July 2013).[26] If the *Act on excise duty* decision was made on the basis of assumptions analogous to those accepted by the ICC, it would mean that the PCT presumes that in concrete review proceedings there is always a judge *a quo* whose obligation is to ensure the effective application of EU law in the national legal system. If there is a domestic judge who is obliged or entitled (depending on the existence of a judicial remedy against its decisions) to refer to the ECJ, the PCT is not a court within the meaning of Article 267(3) TFEU in such proceedings.[27] Yet, this is only one of many possible interpretations of the *Act on excise duty* decision. The aforementioned interpretation is pillared by several theses expressed by the PCT. Firstly, the PCT accentuated the European mandate of national courts,[28] as it held that the domestic (ordinary and administrative) courts are the primary judicial bodies responsible for the correct application of EU law in Poland. This was pointed out by the PCT, when it held that the issue of solving conflicts between EU law and domestic statutes falls outside the scope of jurisdiction of the PCT, since the decisions on whether the statute remains in conflict with EU law are to be delivered by the Supreme Court, administrative courts, and common courts, while the interpretation of EU law norms is to be provided by the ECJ by way of a preliminary ruling.

The second thesis which assists the proposed interpretation of the PCT's decision is the adoption of the "isolationist strategy" toward the ECJ. As the PCT indicated, this point was

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[25] *See* Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are We in the Mood for Dialogue?*, TILSBURG INSTITUTE OF COMPARATIVE AND TRANSNATIONAL LAW WORKING PAPER 11 (2009/10), *available at* https://ssrn.com/abstract+1483664. Further on the issue of the ICC's previous case-law concerning the preliminary ruling procedure, see Marco Dani, *Tracking Judicial Dialogue—The Scope for preliminary Rulings from the Italian Constitutional Court*, 10 THE JEAN MONNET WORKING PAPER 5–12 (2008), *available at* www.JeanMonnetProgram.org.

[26] *See* Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ('Incidenter') Proceeding*, 14 EUR. PUB. L., 633–46 (2014); Ugo Adamo, *Nel dialogo con la Corte di giustizia la Corte costituzionale è un organo giurisdizionale nazionale anche nel giudizio in via incidentale. Note a caldo sull'ord. N. 207/2013*, 1 RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (2014); Adelina Adinolfi, *Una «rivoluzione silenziosa»: il primo rinvio pregiudiziale della Corte costituzionale italiana in un procedimento incidentale di legittimità costituzionale*, 4 RIVISTA DI DIRITTO INTERNAZIONALE (2013).

[27] On the disadvantages of such a concept in the Italian legal system, see MARTA CARTABIA, JOSEPH H.H. WEILER, L'ITALIA IN EUROPA, PROFILI ISTITUZIONALI E COSTITUZIONALI 196–97 (2000).

[28] *See* Michal Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts* in CONSTITUTIONAL CONVERSATIONS IN EUROPE 287–308 (Maartje de Visser & Catherine Van De Heyning eds., 2012).

made to eliminate any potential overlap between the PCT and the ECJ's jurisdiction followed by concurrent rulings on the same legal issues, as well as to prevent any dysfunction appearing in relations between the EU and Polish legal orders. The PCT highlighted that the ECJ and the PCT may not be juxtaposed as courts competing with each other and stated that "it is essential to indicate the different roles of both courts" (although it did not discuss this further).[29] In the *Act on excise duty* decision, the PCT also remarked that even the adoption of the 'isolationist doctrine' does not guarantee that no clash will occur between the ECJ and the PCT judgments. Moreover, the PCT held that it shall retain its status of the "last word" court on fundamental issues relating to the constitutional system of the State. This thesis suggests that the PCT will be rather cautious in referring to the ECJ. Taking into account the recent FCC decision of 14 January 2014, which issued a first preliminary reference concerned the validity and not the interpretation of EU law, it may be claimed that the PCT might also make use of the preliminary reference tool not only to serve as evidence of friendliness towards the ECJ but also as a warning.[30] However, as A. Lazowski rightly points out, the PCT fails to define in the decision matters of constitutional importance in which it reserves for itself the final word.[31] This makes the reservation vague and flexible.[32]

III. Supronowicz *Judgment—The PCT Considers for the First Time the Duty to Refer With Regard to an Adjudicated Case*

The status of the PCT as "a court" under Article 267(3) TFEU was considered *in abstracto* in both the *Accession Treaty* judgment and the *Act on excise duty* decision.

The judgment of 16 November 2011 in the case SK 45/09 (hereafter, the *Supronowicz* judgment) has the opposite character. The case dealt with a constitutional complaint submitted by Ms. Anna Supronowicz. The facts of the constitutional complaint were as follows.

Ms. Supronowicz was convicted of an offence against the life and health of Mr. De Leeuv. As part of criminal proceedings pending against Ms. Supronowicz, the Court of Appeal in Brussels, in a decision of 23 December 2004, ordered Ms. Supronowicz to pay Mr. Jacques

[29] This standpoint strongly resembles the position taken by the ICC in the Granital and *Mesagerazio Servizi* judgments, where the ICC strongly isolated itself from the application of the EU law and gave the floor to ordinary and administrative courts.

[30] The other constitutional courts which have raised preliminary questions concerning the validity of EU law are: the Belgian Constitutional Court, the Austrian Constitutional Tribunal, and the German Federal Constitutional Court.

[31] Similarly to, among others, the German Federal Constitutional Court (ultra vires doctrine and the constitutional identity review) and the ICC (*controlimiti* concept).

[32] *See* LAZOWSKI, *supra* note 21, at 194.

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Andre De Leeuv the amount of EUR 12,500 as compensation for the material and moral damage which Mr. De Leeuv suffered. Both Ms. Supronowicz and the Belgian Public Prosecutor's Office lodged appeals against the judgment of the Criminal Court in Brussels and appellate proceedings were carried out. On 11 May 2006, Mr. De Leeuv requested the enforceability of the decision of the Belgian Court on the territory of Poland. Ms. Supronowicz lodged an appeal against the Polish court's declaration that the decision was enforceable. After an unsuccessful appeal against this ruling, Ms. Supronowicz submitted a constitutional complaint, in which she requested the determination of the unconstitutionality of several provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[33] (principle of equality: Article 32, and right to a fair trial: Article 45 of the Polish Constitution).

The PCT followed the doctrine of "separate pools of cognition" adopted in the *Act on excise duty* decision and held that it is necessary to draw a distinction between examining the conformity of the acts of EU secondary legislation with the Treaties (i.e., the EU primary law), on the one hand, and examining their conformity with the Constitution, on the other. However, the *Supronowicz* judgment was the first case in which the PCT considered the necessity of making a preliminary reference regarding an adjudicated issue.

The judgment echoed all over Europe, as it was the first time since the *Solange I* judgment of the FCC in 1974 that a domestic constitutional court had dared to carry out a constitutional review of a Community regulation.[34] Nevertheless, it should also be highlighted that the controversial standpoint of the PCT was softened by the thesis expressed in the last part of the statement of reasons.

There, the PCT emphasized that it had reviewed the conformity of the EU's secondary legislation with the Constitution for the first time. Therefore, the issue of admissibility of a constitutional complaint was firstly determined, and then the PCT considered the issue of the substantial validity of the EU secondary legislation. Moreover, due to that new situation, the PCT decided to thoroughly examine the allegations, comparing the challenged EU provisions with the higher-level norms for the constitutional review, as indicated by the complainant. The PCT also noted that there was a need to determine, for the future, the manner of reviewing the constitutionality of the norm of EU law (the Treaties and secondary legislation) in the course of reviewing proceedings commenced by

[33] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. 1, as amended.

[34] *See* Piotr Bogdanowicz, Pawel Marcisz, *Szukając granic kontroli– glosa do wyroku TK z 16.11.2011 r. (SK 45/09),* 9 EUROPEJSKI PRZEGLĄD SĄDOWY 47 (2012); Jan Galster, Agnieszka Knade-Plaskacz, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 r. (sygn. akt SK* 45/09*)*, 6 PRZEGLĄD SEJMOWY 131 (2012).

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way of a constitutional complaint.[35] Repeating the formula known from the FCC decision in *Solange II*[36] and the judgment of the European Court of Human Rights (ECtHR) in *Bosphorus,*[37] the PCT decided that in the case of a constitutional complaint which challenges the conformity of a legal act of EU secondary legislation with the Constitution, the complainant is requested to prove that the challenged act causes a considerable decline in the standard of protection of rights and freedoms, by comparison with the standard of protection guaranteed by the Polish Constitution. Since then, this has become an essential element of the requirement to indicate the manner in which rights or freedoms have been infringed by the challenged EU legislative provisions.[38] According to the PCT, the need for this, more specific rendering, is justified by the character of the acts of EU law, which enjoy a special status in the Polish legal order and which come from legislative centers other than the organs of the Polish state. The PCT also emphasized that such a requirement follows the allocation of the burden of proof in review proceedings commenced by way of a constitutional complaint. However, this is not tantamount to possible indication (proof) that there has been an infringement of the Constitution, which is the task of the PCT.[39]

As regards the preliminary reference procedure, the PCT indicated in the *Supronowicz* judgment that Poland accepted the division of powers between the CJEU and the PCT with regard to the review of EU legal acts. The result of this division is the jurisdiction of the CJEU to provide the final interpretation of EU law and to determine the conformity of the acts of EU secondary legislation with the Treaties and the general principles of EU law. Consequently, the PCT emphasized the subsidiary character of its jurisdiction to examine the conformity of EU law (both primary and secondary) with the Constitution. The acknowledgement of the subsidiary character of such jurisdiction was followed by the statement that before adjudicating on the non-conformity of an act of EU secondary legislation with the Constitution, the PCT is obliged to consider the necessity of making a reference to the CJEU.[40] Although the case concerned the issue of the conformity of the Council Regulation with constitutional provisions, the PCT referred to hypothetical doubts regarding its compliance with EU primary law and held that in the adjudicated case there was no doubt as to the conformity of the challenged Council Regulation with EU primary

[35] Point 8.2. of the judgment.

[36] Statement of the German FCC from 22 October 1986, sign. 2 BvR 197/83.

[37] Bosphorus Airlines v. Ireland, App. No. 45036/98, (Jan. 30, 2005), http://hudoc.echr.coe.int/.

[38] Point 8.5 of the judgment.

[39] Point 8.5 of the judgment.

[40] What is worth mentioning is that the PCT referred to the view presented by the German FCC in its judgment of 6 June 2010 in the case *Honeywell.*

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law, and hence—within the meaning of the *Foto Frost* doctrine—there was no need to refer to the CJEU for a preliminary ruling.

The *Supronowicz* judgment clearly shows that the PCT acknowledged its status as "a court" under Article 267(3) TFEU in the constitutional complaint procedure (which is a form of concrete constitutional review in the Polish legal system). As well as this, the PCT suggested in this judgment that it may use the preliminary ruling procedure—similarly to the FCC—as a warning before declaring that the challenged EU law is unconstitutional. Moreover, in the context of the standard of review in the Supronowicz case (the right to a fair trial guaranteed in Article 45 of the Polish Constitution), it is worth pointing out that the PCT is not entitled to decide on constitutional complaints submitted against a final judgment—by a court of last resort—that contain the allegation that this court's omission in raising a preliminary question to the CJEU infringed the complainant's constitutional right to fair trial.[41] This results from the fact that in Poland, a constitutional complaint may be submitted only against a legal act, not a court's judgment or an administrative decision.

D. Missed Opportunities?

I support the view that in the *Supronowicz* case the preliminary reference was needless. There were neither doubts concerning the validity of the EU Regulation nor its interpretation. Yet, when the missed opportunities are considered, it is worth analyzing the broader context of two PCT rulings: the judgment of 7 November 2007, K 18/06, which serves as an example of a lack of coherence between determining PCT and CJEU criteria of nondiscrimination, and the judgment of 10 December 2014 K 52/13, where the EU law perspective became inevitable within the PCT's considerations regarding the effects of its ruling.

I. Act on Income Tax *Judgment in Light of the CJEU's Judgment in the* Filipiak *Case*

As the evaluation of the judgment of 7 November 2007, K 18/06 (hereafter, the *Act on income tax* judgment) depends on the broader factual and legal context, it is worth briefly presenting the main facts of the *Filipiak* case.

Mr. Filipiak, a Polish citizen, was pursuing economic activity in the Netherlands as a partner in a partnership under Dutch law; the organizational structure of this partnership corresponded to that of a general partnership under Polish law. Pursuant to Article 3 of the Act of 26 July 1991 on income tax payable by natural persons (Journal of Laws of

[41] *See* Markéta Navrátilová, *The Preliminary Ruling before Constitutional Courts*; Clelia Lacchi, *The Obligation of National Courts of Last Instance to Make a Reference For a Preliminary Ruling to the Court of Justice of the EU as a Constitutional Guarantee*, in this Special Issue.

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2000, No 14, item 176; hereafter, the Act on income tax) Mr. Filipiak was subject to unlimited tax liability in Poland. However, in the Netherlands, he paid the social security and health insurance contributions required of him by Dutch legislation. In a letter of 28 June 2006, Mr. Filipiak requested from the director of the tax office of Nowy Tomyśl advice in writing on the scope and manner of application of tax law. In his request for that advice, Mr. Filipiak observed that the provisions of the Act on income tax did not allow him to deduct the social security contributions paid in the Netherlands from his basis of assessment, nor to reduce the tax by the amount of the health insurance contributions also paid in the Netherlands. He claimed that such provisions were discriminatory and, that being the case, that those provisions should be disregarded and EU law should be applied directly. With the decision of 2 August 2007, the director of the Nowy Tomyśl tax office replied to the request for advice and expressed the view that Mr. Filipiak's position was unfounded. The director stated that, pursuant to Article 26(1)(2) of the Act on income tax, the only contributions which could be deducted from the basis of assessment were those specified in the Act on social security and that, pursuant to Article 27b(1) of the Act on income tax, the only health insurance contributions which could be deducted from tax were those specified in the Law on publicly funded healthcare benefits. As the contributions paid under Dutch law did not satisfy the criteria laid down in those provisions, they could not be deducted in Poland from the basis of assessment and from income tax respectively. When this administrative decision was upheld, Mr. Filipiak brought an action against it before the Regional Administrative Court in Poznań on the grounds that they infringed, *inter alia*, Articles 26(1)(2) and 27b(1) of the Act on income tax, Article 39(2) EC, Article 3(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996[42] as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005[43] ('Regulation No 1408/71'), and various provisions of the Polish Constitution.

The Regional Administrative Court in Poznań took the view that the prerequisites for an infringement of the freedom of movement for workers provided for in Article 39 EC were not satisfied in the present case. The court stated in this regard that, since the applicant in the main proceedings was a businessman who was a member of a general partnership based in the Netherlands, he was self-employed and did not work on the orders or under the control of another person. He could not, therefore, be regarded as a "worker" within the meaning of Article 39 EC. The Regional Administrative Court in Poznań considered that it was essential to examine whether the provisions at issue were compatible with a provision which was not relied on by Mr. Filipiak, namely Article 43 EC, where the effect of those provisions is that a taxpayer who is subject to unlimited tax liability in Poland on

[42] 1997 O.J. 1997 (L 28) 1.

[43] 2005 O.J. (L 117) 1.

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the entirety of his income and who pursues economic activity in another Member State is not allowed to deduct from his basis of assessment the amount of the compulsory social security contributions paid in the Netherlands and is not allowed to reduce his income tax by the amount of the compulsory health insurance contributions also paid in the Netherlands, even though those contributions were not deducted from in that Member State.

What is crucial for further consideration is the fact that the PCT reviewed the provisions of the Act on income tax in the aforementioned *Act on income tax* judgment. The PCT ruled partial unconstitutionality of the challenged statutory provisions and held that they did not conform with the Constitution to the extent to which they do not allow a taxpayer who pursued economic activity in another Member State, and who paid in this Member State compulsory social security and health insurance contributions, to deduct them from income deriving from an activity pursued outside Poland and from the tax payable thereon, where those contributions were not deducted in the Member State in which that activity was pursued. Those provisions are not compatible with the principle of equality before the law laid down in Article 32 of the Constitution, in conjunction with the principle of social justice, set out in Article 2 of the Constitution. [44] Yet, in the same judgment, pursuant to Article 190(3) of the Constitution, the PCT decided to defer the date on which the provisions held to be unconstitutional would lose all binding force to a date other than that of the publication of the judgment, namely to 30 November 2008.[45]

The deferral of the *Act on income tax* judgment's effects had a direct impact on the Regional Administrative Court in Poznań's referral to the CJEU. The Regional Administrative Court in Poznań decided to refer two preliminary questions.

In the first one, it asked whether the first and second paragraphs of Article 43 EC must be construed as precluding the provisions of Article 26(1)(2) of the Act on income tax, under which the right to a reduction of the basis of assessment for income tax by the amount of compulsory social security contributions is restricted to contributions paid on the basis of provisions of national law. The Regional Administrative Court in Poznań asked also whether the provisions of Article 27b(1) of that Act, under which the right to a reduction

[44] *See also* Adam Lazowski, *Half Full and Half Empty Glass: the Application of EU Law in Poland (2004-2010),* 48 COMMON MKT. L. REV. 548 (2011); Adam Zalasiński, *Odliczenie dla celów podatkowych składek na ubezpieczenie społeczne i zdrowotne, zapłaconych za granicą. Glosa do wyroku TK z 7 listopada 2007 r. (K 18/06),* 4 PRZEGLĄD PODATKOWY 41 (2008).

[45] Pursuant to Art. 190(3) of the Polish Constitution: "A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers."

of income tax by the amount of compulsory health insurance contributions is restricted to contributions paid on the basis of the provisions of national law, in the case where a Polish national, who is subject to unlimited liability to tax in Poland on income taxed there, has paid in another Member State compulsory social security and health insurance contributions in respect of the economic activity pursued in that other State, and those contributions have not been deducted either from income or from tax in that other Member State.

The second question, which is of greater interest in the context of the relationship between constitutional courts and the CJEU, concerned the doubt as to whether the principle of the primacy of EU law must be construed as taking precedence over the provisions of the Polish Constitution in so far as the entry into force of a judgment of the PCT has been deferred on the basis of those provisions.

At this point, the issue of an alleged missed opportunity arises. The main question in this regard is: Could the PCT have prevented the appearance of the *Filipiak* case?

For a comprehensive answer, it is necessary to point out that the *Act on income tax* case before the PCT was initiated in abstract review proceedings, so there was no need to stick strictly to the separate fields of cognition doctrine adopted in the *Excise duty act* decision.

The Ombudsman (Commissioner for Citizens' Rights), as the applicant, argued that the challenged provision not only infringed the Constitution (Article 32) but also infringed EU law, and was especially inconsistent with the provision on free movement for workers (Article 45 TFEU; ex 39 and 48). Therefore, the PCT had the hypothetical possibility of making a reference to the CJEU asking for the interpretation of Article 45 TFEU.

As the main legal issue in this case concerned the conformity of the statutory provisions with the constitutional principle of equal treatment, the PCT was not obliged to refer to the CJEU. However, the PCT did not totally skirt around the EU law context of the constitutional issue. It held "single-handedly" that the freedom of movement of workers imposes an obligation of equal treatment and non-discrimination of workers who are nationals of one Member State and work in this State and those who are nationals of other EU Member States but work in the same Member State as the former group. Such an interpretation of Article 45 of the EC Treaty led the PCT to the conclusion that Article 45 of the EC Treaty did not regard the challenged provisions as regulating the relations between Poland and its citizens (taxpayers) working abroad. (On the other hand, it should be highlighted that the PCT added that by respecting the principle of EU-friendly interpretation of domestic law, it had to be stated that the challenged statutory provisions did not serve for the full effectiveness of EU law, especially of the freedom of movement of workers, since they might discourage Polish citizens from working in other EU Member States.)

In the *Filipiak* judgment, the ECJ adopted a different interpretation of Article 45 of the EC Treaty as it held that every taxpayer who is also resident in Poland (and not only Polish nationals) but pursues his economic activity within another EU Member State and pays into compulsory social security and health insurance schemes there, but is not able to either deduct them from the basis of assessment in Poland or to reduce the tax payable in Poland by the amount of these compulsory health insurance contributions, is treated in a discriminatory way when compared to every worker not resident in Poland but pursuing their economic activity in Poland.[46]

The *Filipiak* case proves that the "isolationist strategy" towards the ECJ, adopted by the PCT in the *Excise tax act* decision, does not always effectively eliminate all potential overlap between the PCT and ECJ jurisdictions. The juxtaposition of the PCT's *Act on income tax* judgment and the ECJ's *Filipiak* judgment shows concurrent interpretations of the principle of equality and of the freedom of movement of workers. Therefore, the PCT's avoidance of "competitiveness of jurisdictions" paradoxically led to such competitiveness and probably had a significant impact on the Regional Administrative Court's decision to refer to the ECJ in the *Filipiak* case.[47]

As regards the missed opportunities, the *Act on income tax* judgment serves as an example of a case where the PCT could have (at least) considered referral to the ECJ concerning the interpretation of Article 45 EC Treaty. Such a preliminary ruling could have allowed the avoidance of different perceptions of the similarity criterion by the PCT and the ECJ. Moreover, in such a scenario, the Filipiak case would not have appeared at all, since it was, among others factors, the lack of sufficient Europeanization of the constitutional principle of equality that arguably influenced the decision of the Regional Administrative Court in Poznań to refer to the ECJ.[48]

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[46] The ECJ concurred with the PCT's view on the lack of differentiation of legal situation among Polish nationals working abroad. Concomitantly, it pointed out that what had to be compared was the situation of Polish nationals who resided in Poland and pursued their economic activity in Poland with the situation of Polish nationals who resided in Poland but pursued their economic activity in another Member State. According to the ECJ, the taxation of both groups should be conducted by applying the same rules of tax deduction. As a result, the Court, by answering to the first preliminary question, stated that provisions of Polish tax law violated the freedom of establishment and freedom to provide services under Arts. 43 and 49 of the EC Treaty. *See* Przemysław Mikłaszewicz, *Pytanie prejudycjalne do TS oparte na wadliwej wykładni prawa krajowego dokonanej przez sąd pytający (w kontekście wpływu odroczenia przez TK terminu utraty mocy obowiązującej niekonstytucyjnych przepisów krajowych na skuteczność prawa UE) – glosa do wyroku WSA w Poznaniu z 14.01.2010 r. (I SA/Po 1006/09)*, 10 EUROPEJSKI PRZEGLĄD SĄDOWY 41 (2011); Aleksandra Kustra, *Odroczenie przez TK mocy obowiązującej przepisu niezgodnego z prawem UE – glosa do wyroku TS z 19.11.2009 w sprawie C-314/08 Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, 6 EUROPEJSKI PRZEGLĄD SĄDOWY 34–40 (2012).

[47] KUSTRA, *supra* note 42, at 39–40.

[48] The decision of *Wojewódzki Sąd Administracyjny w Poznaniu* of 30 May 2008, signature I SA 1756/07.

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On the other hand, the PCT's *Act on income tax* judgment can be also considered a thoughtful choice. Such an interpretation of this ruling is based on the assumption that the PCT decided to flag the autonomy of constitutional and EU standards of review even if they might have appeared to be legal equivalents. In the *Act on income tax* case, these standards had a different character, as the constitutional principle of equality and non-discriminatory treatment is considered as a constitutional right, whereas the Treaty provisions indicated by the applicant related to the four Community freedoms. Yet, taking into account the broader context of the ECJ's recent judgments regarding the application of the Charter in the domestic legal systems of the EU Member States (*Melloni,*[49] *Åkerberg,*[50] *Aliyev*[51]), the emphasis on the autonomy of the constitutional and EU law standards of review enhances the position of many constitutional courts, leaving them as the "last word courts" in the sphere of the protection of constitutional rights.[52]

II. Ritual Slaughter *Judgment in Light of its Effects*

Another case that may be considered to be a missed opportunity to refer to the CJEU is the PCT's judgment of 10 December 2014, K 52/13, concerning an application filed by the Association of Jewish Religious Communities in the Republic of Poland with regard to the ban on ritual slaughter (hereafter, the *Ritual slaughter* judgment). In this judgment, the PCT decided that the lack of permission to subject animals to slaughter in a slaughterhouse in accordance with special methods prescribed by religious rites is inconsistent with the Constitution.

The initiator of the proceedings before the PCT claimed that an absolute ban, backed up by criminal sanctions, on the slaughter of animals in accordance with special methods prescribed by religious rites (usually referred to as "ritual slaughter"), did not conform with freedom of religion, guaranteed by Article 53 of the Constitution and Article 9 of the European Convention on Human Rights (ECHR).

The PCT determined that what had been challenged by the applicant was the absolute ban on ritual slaughter—in other words, a ban on carrying out ritual slaughter in a slaughterhouse, to which there were no exceptions. The said ban had been reinforced by

[49] C–399/11, Stefano Melloni v. Ministerio Fiscal (February 26, 2013), http://curia.europa.eu/.

[50] C–617/10, Judgment of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson (Feburary 26, 2013), http://curia.europa.eu/.

[51] Case C–112/13, A v. B and Others, (September 11, 2014), http://curia.europa.eu/

[52] Further on this issue, see Daniel Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9 EUR. CONST. L. REV. 391–419 (2013); Filippo Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C–617/10 Åklagaren v. Hans Åkerberg Fransson*, 9 EUR. CONST. L. REV. 315 (2013).

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criminal sanctions. In that legal context, Article 9(2) of the Act of 20 February 1997 on relations between the State and Jewish Religious Communities in the Republic of Poland, which stipulated that those religious communities had the broadly defined task of "adhering to the practice of ritual slaughter," might not alone be construed as a basis for carrying out the ritual slaughter required by Judaism. The PCT indicated that ritual slaughter carried out in a slaughterhouse was permissible pursuant to Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, which had been applied directly since 1 January 2013. However, the Council Regulation permitted EU Member States to maintain in place any national rules that were binding at the time of entry into force of the Regulation and that were aimed at ensuring more extensive protection of animal welfare during slaughter. These rules were the challenged regulations of the Animal Protection Act, which prohibited ritual slaughter.

The PCT considered whether ritual slaughter was subject to protection in the light of freedom of religion, which constituted a fundamental freedom of the individual. The obligation to respect freedom of religion was strictly related to the protection of the inherent and inalienable dignity of the person. The PCT stated that the guarantee of freedom of religion, provided in Article 53(1) and (2) of the Constitution, comprised the carrying out of any activities (practices, rites, or rituals) which were religious in character. That also included unusual religious activities, or even those that might be unpopular with a majority of the public. The constitutional protection also included ritual slaughter, which has been practiced for centuries by the followers of Judaism and Islam. Ritual slaughter was also subject to protection under Article 9 of the ECHR, which had been emphasized by the ECtHR.

The PCT decided that in light of the constitutional and ECHR standards of protection, an absolute ban on ritual slaughter, backed up by criminal sanctions, constituted a restriction of the freedom to manifest religion. However, as the freedom to manifest religion is not absolute in character and may be subject to statutory restrictions, the main constitutional issue to decide was whether this restriction met constitutional (and conventional) requirements (i.e., was proportionate). One of the main elements of the constitutional belief in proportionality in Poland is the necessity of the limitation. This means that the limitation is necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons.

The PCT decided that there was no link between the absolute ban on ritual slaughter and the necessity to protect any of the aforementioned constitutional values. The PCT highlighted that the lack of any risk to the safety and hygiene of food, as well as to the health of consumers, was confirmed by the fact that the carrying out of ritual slaughter in a slaughterhouse had been permitted by the rigorous provisions of Council Regulation (EC) No 1099/2009, as well as the hitherto practice of carrying out ritual slaughter, with regard to which such risks had not been pointed out. Moreover, the admissibility of ritual

slaughter remained inextricably linked to the obligation of competent state authorities to control adherence to numerous requirements for carrying out the said slaughter.

The PCT highlighted that although the introduction of the absolute ban on the slaughter of animals in a slaughterhouse was not necessary for the protection of health or morals, it reflected deep concern for the welfare of farmed animals at the time of slaughter. The introduction of the absolute ban on ritual slaughter had been proposed by numerous Polish and international organizations who were concerned with enhancing the protection of animals. The protection of animals, including farmed animals at the time of slaughter, was also embedded in constitutional axiology. However, the statement that a restriction on the freedom to manifest religion in the form of the absolute ban on ritual slaughter was not necessary for the protection of any categories of the public interest, as specified in Article 53(5) and Article 9(2) of the ECHR, entailed that the restriction did not meet the requirements set by the Constitution and the ECHR.

Due to the significance of the problem under discussion, the PCT also addressed the question of the effects of the judgment. It pointed out that as of the date of the publication of the judgment in the *Journal of Laws*, it would be permissible to subject animals to ritual slaughter in an appropriate slaughterhouse on the basis of Article 4(4) of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (hereafter, Council Regulation No 1099/2009). And here the doubts begin. Should (or at least could) the PCT have referred a preliminary question regarding the interpretation of this EU law provision?

Article 4 of Council Regulation No 1099/2009 regulates methods of stunning animals. Pursuant to Article 4(1),

> Animals shall only be killed after stunning in accordance with the methods and specific requirements related to the application of those methods set out in Annex I. The loss of consciousness and sensibility shall be maintained until the death of the animal. The methods referred to in Annex I which do not result in instantaneous death (hereafter, simple stunning) shall be followed as quickly as possible by a procedure ensuring death such as bleeding, pithing, electrocution or prolonged exposure to anoxia.

Article 4(4) provides an exception from the rule introduced in Article 4(1). Pursuant to Article 4(4), "In the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse."

The general tone of the judgment suggests that the PCT decided that the challenged statutory provisions were not in conformity with the constitutional standards because

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they did not provide for any exceptions regarding the manifestation of religion (which, according to the PCT, includes ritual slaughter). What remained outside the scope of adjudication was a number of matters, such as the end use of meat obtained through ritual slaughter, the possibility of limiting the scale of such slaughter, and the export of the meat obtained through the slaughter. Therefore, the PCT could have used the opportunity to make a reference to the CJEU regarding the scope of the exception provided for, namely the acceptance of the ritual slaughter carried out for export in light of recitals 4 and 18 of the preamble of Council Regulation No 1099/2009.[53] The answer could have shaped both the sentence of the judgment (providing for a partial unconstitutionality) and its effects (in a more detailed way delineating the future actions of the Polish legislator, who would be either obliged or merely entitled to introduce further restrictions on the ritual slaughter carried out in Poland). Nevertheless, the case cannot be considered as an obvious example of an omission in referring for a preliminary ruling. If anything, it is, rather, a missed opportunity to start a formal dialogue with the CJEU.

E. Conclusions

Nowadays, EU law is increasingly becoming a benchmark in the process of constitutional adjudication. Constitutional courts have started to apply EU law more actively, as they recognize that "the isolationist doctrine" is not in their long-term interest.[54] They may refer to EU law in order to determine a "demarcation line" which separates the ECJ and constitutional courts' fields of cognition, but they may also apply EU law while interpreting constitutional standards in compliance with EU law. This results from the fact that international law and EU law standards today heavily affect constitutional standards and sometimes determine their modification (elevation or diminution). The procedural cooperation with the ECJ in the form of preliminary references also helps constitutional courts to effectively defend their political position *vis-à-vis* national courts, which

[53] "(4) Animal welfare is a Community value that is enshrined in the Protocol (No 33) on protection and welfare of animals annexed to the Treaty establishing the European Community (Protocol (No 33)). The protection of animals at the time of slaughter or killing is a matter of public concern that affects consumer attitudes towards agricultural products. In addition, improving the protection of animals at the time of slaughter contributes to higher meat quality and indirectly has a positive impact on occupational safety in slaughterhouses."

"(18) Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union."

[54] *See* Jan Komarek, *The Place of Constitutional Courts in the EU,* 9 EUR. CONST. L. REV. 442 (2013).

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sometimes use their "Community mandate" to weaken the constitutional courts' position.[55]

All these factors have caused the recently observed significant shifts in the jurisprudence of several constitutional courts concerning the application of the preliminary ruling procedure. The Spanish Constitutional Tribunal (2011), the French Constitutional Council (2013), and last but not least the FCC (2014), have all decided to refer to the ECJ their first preliminary questions. Another piece of evidence for the aforementioned jurisprudential shifts is the ICC's decision n. 207, dated 18 July 2013, in which the ICC, for the first time, made a reference to the ECJ in the context of an incidental proceeding (*via incidentale)*.

With this trend in mind, it is quite likely that the PCT will also refer to the CJEU in the not too distant future. At the same time, there is still some doubt regarding the PCT's reservations concerning the scope of such an obligation and the judicial "missed opportunities." Therefore, the analysis of the PCT's present standpoint as regards the preliminary ruling procedure is like reading tea leaves. The future is still blurred. In the *Accession Treaty* judgment, the PCT accepted the obligation to make a reference to the ECJ, at least when performing constitutional review of legislation. Yet, in the *Act on excise duty* decision, the PCT suggested that it might not consider itself as a court within the meaning of Article 267(3) TFEU in concrete review proceedings, as in this type of proceedings there is always a judge *a quo* whose obligation is to ensure the effective application of EU law in the national legal system. On the other hand, in the *Supronowicz* judgment, the PCT acknowledged its status as "a court" under Article 267(3) TFEU in the constitutional complaint procedure (which is a form of concrete constitutional review in the Polish legal system). Two other judgments of the PCT—the *Act on income tax* judgment and the *Ritual slaughter* judgment—serve as examples of missed opportunities to refer. Thus, one thing is certain: the PCT is still looking for a "good case" to start the direct dialogue with the CJEU.

Postscript:

The PCT formulated its first reference for a preliminary ruling—with two questions – in the decision of 7 July 2015, case K 61/13.

The analysis of PCT judgments rendered in the *Accession Treaty* judgment (K 18/04) and the *Supronowicz* judgment (SK 45/09), as presented in this paper, leads to the conclusion that a reference for a preliminary ruling by the PCT may only occur if certain conditions are satisfied. Firstly, the PCT considered itself a "court" within the meaning of Article 267(3) TFEU but only in respect of discharging its primary duty, that is controlling the

[55] Daniel Sarmiento, *Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law: Tribunal Constitutional*, 50 COMMON MKT. L. REV. 890 (2013).

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hierarchical conformity of legal norms (as opposed to, e.g., resolving disputes over authority). Secondly, according to the PCT, such a reference may only be formulated in cases of the PCT applying EU law. The final issue that needed to be resolved—at least before the decision K 61/13 of 7 July 2015 was rendered—was the definition of what the PCT's application of EU law means. Formerly, this condition could be interpreted in two ways: narrowly (EU law being the direct object or a benchmark for judicial review), or broadly (EU law as an element affecting the interpretation of domestic legal norms being reviewed or used as a benchmark).

The decision of 7 July 2015 proves that the PCT has adopted the broad interpretation of the meaning of "application of EU law." The case which served as the basis for the reference for a preliminary ruling was heard by the PCT upon the Commissioner for Citizens Rights' (Polish Ombudsman, hereafter: Commissioner) application for the declaration of several provisions of the Act of 11 March 2004 on the goods and services tax[56] (hereinafter, VAT Act).[57] The provisions challenged by the Commissioner determine which goods are taxed at a reduced VAT rate. The reduced rates of 5% and 8% may be applied only to publications that are published in print or on carriers (disks, tapes, etc.) but not to electronic publications, which are subject to the VAT rate of 23%. According to the Commissioner, such a differentiation in the levying of a tax on publications with the same relevant characteristics, namely identical content, violates the principle of tax equality. As the PCT noted in the statement of reasons in the decision of 7 July 2015, the provisions of the VAT Act challenged by the Commissioner implement Directive 2006/112/EC. Poland applies the base rate of VAT to deliveries of electronically provided books because of the requirement to adhere to EU law. The base rate is different from the reduced rate applied to books recorded on carriers.

The PCT held in the statement of reasons of the reference decision that as a court applying indirectly (through provisions of the VAT Act) norms of EU law (Directive 2006/112/EC) it is obliged, first and foremost, to request that the ECJ issue a preliminary ruling regarding the validity of Directive 2006/112/EC itself. This is necessary, the PCT argues, because a decision on the constitutionality of the VAT Act provisions challenged by the Commissioner depends on the ECJ ruling on the validity of the Directive.[58]

[56] Journal of Laws of 2011, No. 177, item 1054, as amended.

[57] More precisely, the Commissioner applied for the declaration of Items 72, 73, 74 and 75 of Schedule 3 to the VAT Act read in conjunction with Article 41(2) VAT Act, and Items 32, 33, 34 and 35 of Schedule 10 to the VAT Act read in conjunction with Article 41(2) VAT Act, as incompatible with Article 32 of the Constitution read in conjunction with Articles 84 and 2 of the Constitution, to the extent these provisions excluded the application of reduced rates of VAT to digital books and other electronic publications.

[58] *Cf.* para. 3.1.2 of the decision's statement of reasons.

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What is important here is the fact that, as early as in its first reference for a preliminary ruling, the PCT decided to ask two questions on the validity—rather than interpretation—of EU law. These were the following:

(1) Is point (6) of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[59] (hereinafter: Council Directive 2006/112/EC), in the wording amended by the provisions of Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax[60] (hereinafter: Council Directive 2009/47/CE) invalid because a material procedural requirement for consultation with the European Parliament was violated during the lawmaking process?

(2) Is Article 98(2) of Directive 2006/112/EC, read in conjunction with point (6) of Annex III thereto, invalid because it violates the principle of tax neutrality as far as the said article excludes the application of reduced tax rates to books published in a digital form and to other electronic publications?

The PCT decision of 7 July 2015 reinforces the visible tendency for constitutional courts to be increasingly more active in using the preliminary reference procedure. Still, this arguably poses a valid question: Is the case in respect of which the PCT decided, 11 years after Poland's accession to the EU, to make a reference for a preliminary ruling to the ECJ the basis for formulating jurisprudential arguments with far-reaching consequences for the entire EU legal system? Or is this case of secondary importance? Was it a "good case" to start the direct dialogue with the CJEU?

It remains to be seen whether the decision of 7 July 2015 will become a one-off gesture towards judicial dialogue, or instead the starting point of a jurisprudential strategy that puts stronger emphasis on a constitutional court's application of EU law.

[59] 2006 O.J. (L 347) 1, as amended.

[60] 2009 O.J. (L 116) 18.

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